

QUESTIONNAIRE FOR NOMINEES BEFORE THE COMMITTEE ON THE JUDICIARY,
UNITED STATES SENATE

1. **Name:** Full name (include any former names used).
Answer: Richard Carl Wesley

2. **Position:** State the position for which you have been nominated.
Answer: United States Circuit Judge of the U.S. Court of Appeals for the Second Circuit

3. **Address:** List current office address and telephone number. If state of residence differs from your place of employment, please list the state where you currently reside.
Answer:
Home Chambers:
Livingston County Government Center
6 Court Street
Geneseo, New York, 14454
(585) 243-7910

Courthouse Chambers:
20 Eagle Street
Albany, New York 12207-1095

Temporary Courthouse Chambers:
286 Washington Avenue Extension
Albany, New York 12203
(518) 455-7736

4. **Birthplace:** State date and place of birth.
Answer:
August 1, 1949 in Canandaigua, New York

5. **Marital Status:** (include maiden name of wife; or husband's name). List spouse's occupation, employer's name and business address(es). Please also indicate the number of dependent children.
Answer:
Married to Kathryn Rice Wesley (maiden name: Rice)
Occupation: Kindergarten Teacher
Livonia Central School
6 Puppy Lane
Livonia, New York 14487
Number of Dependent Children: 1 (one)

6. **Education:** List in reverse chronological order, listing most recent first, each college, law school, and any other institutions of higher education attended and indicate for each the dates of attendance, whether a degree was received, and the date each degree was received.

Answer:

Cornell University - Cornell Law School

Myron Taylor Hall

Ithaca, New York 14853

Dates of Attendance: September 1971-May 1974

Degree: Juris Doctor, May 1974

State University of New York at Albany

1400 Washington Avenue

Albany, New York 12222

Dates of Attendance: September 1967-May 1971

Degree: Bachelor of Arts, May 1971

State University of New York at Geneseo

1 College Circle

Geneseo, New York 14454

Date of Attendance: July, 1968

No degree received (three-week summer class)

7. **Employment Record:** List in reverse chronological order, listing most recent first, all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, non-profit or otherwise, with which you have been affiliated as an officer, director, partner, proprietor, or employee since graduation from college, whether or not you received payment for your services. Include the name and address of the employer and job title or job description where appropriate.

Answer:

1/97 to present

New York State Court of Appeals

20 Eagle Street

Albany, New York 12207

Title: Associate Judge

4/94 to 12/96

Appellate Division of Supreme Court, Fourth Dept.

50 East Ave., Suite 200

Rochester, New York 14604

Title: Additional Justice

1/87 to 4/94	<p>Supreme Court, Seventh Judicial District Hall of Justice Rochester, New York 14614-2186 <u>Title:</u> Justice Supervising Judge, Criminal Courts - 7th Judicial District (1/91-3/94)</p>
1/83 to 1/87	<p>New York State Assembly Capitol Building Room 545, Legislative Office Bldg. Albany, New York 12248 <u>Title:</u> Member of Assembly -136th District</p>
1/83 to 1/87	<p>Streb, Porter, Meyer & Wesley 131 Main Street Geneseo, New York 14454 <u>Title:</u> Partner</p>
1/77 to 1/83	<p>Welch, Streb, Porter, Meyer & Wesley 131 Main Street Geneseo, New York 14454 <u>Title:</u> Partner</p>
1/79 to 6/82	<p>New York State Assembly Capitol Building Albany, NY 12248 <u>Title:</u> Assistant Counsel to Minority Leader</p>
3/76 to 1/77	<p>Welch, Streb & Porter 131 Main Street Geneseo, New York 14454 <u>Title:</u> Associate Attorney</p>
8/74 to 3/76	<p>Harris, Beach & Wilcox 99 Gamsey Road Pittsford, NY 14534 <u>Title:</u> Associate Attorney</p>
9/73 to 6/74	<p>North 40 & Golden Garter Restaurant 1636 East Shore Dr. (Route 34N) Ithaca, NY 14850 <u>Title:</u> Bartender</p>

6/73 to 9/73	Welch, Streb & Porter 131 Main Street Genesco, New York 14454 <u>Title:</u> Summer Clerk
6/72 to 8/72	NYS Thruway Authority 200 Southern Blvd. Albany, NY 12209 <u>Title:</u> Summer Toll Collector
1/72 to 6/72	NYS Bar Assoc. Committee on Professional Responsibility Cornell Law School Myron Taylor Hall Ithaca, New York 14853 <u>Title:</u> Research Assistant

OTHER ACTIVITIES:

1/00 to present	Cornell University Council Cornell University Ithaca, New York 14853 <u>Title:</u> Board Member
1/99 to present	Cornell Law School Advisory Council Cornell Law School Myron Taylor Hall Ithaca, New York 14853 <u>Title:</u> Board Member
1/89 to present	Myers Foundation c/o Michael Haugh 21 Lynnewood Drive Livonia, New York 14482 (585) 346-2470 <u>Title:</u> Board Member
1981-82, 1996	Monroe County Legal Assistance Corp. 80 St. Paul Street, Suite 700 Rochester, New York 14604 (585) 325-2520 <u>Title:</u> Board Member

1/91-3/94

Pre-Trial Services Corp.
 80 W. Main Street, Suite 200
 Rochester, New York 14614
 (585) 454-7350
Title: Board Member

8. **Military Service:** Identify any service in the U.S. Military, including dates of service, branch of service, rank or rate, serial number and type of discharge received.
Answer: None
9. **Honors and Awards:** List any scholarships, fellowships, honorary degrees, academic or professional honors, honorary society memberships, military awards, and any other special recognition for outstanding service or achievement.

Answer:

Madison Award 2001 - Sullivan Policy Group
 Distinguished Alumni Award 1999 - Alumni Assoc. University of Albany
 Distinguished Service Alumnus Award 1997 - State University of New York
 New York State Bar Association Fellow, 1997 - present
 Award of Gratitude 1986 - PEF-CSEA Council 82
 Legislator of the Year 1983, Livingston - Wyoming Assoc. of Retarded Citizens
 Distinguished Service Award 1985, United University Professions
 Cornell Law Review, Cornell Law School 1973-1974
 Summa Cum Laude, State University of New York at Albany, May 1971
 Myskania, 1971 (peer-selected honor society for SUNY at Albany Seniors)
 Regents Scholarship, 1967-1971

10. **Bar Associations:** List all bar associations or legal or judicial-related committees, selection panels or conferences of which you are or have been a member, and give the titles and dates of any offices which you have held in such groups.

Answer:

New York State Bar Association

New York State Bar Foundation

Livingston County Bar Association

Office: Past Secretary, 1978

Chief Judge's Committee on Alternative Criminal Sanctions (Report Issued in 1993)

Seventh Judicial District Grievance Committee

Monroe County Legal Assistance Corp.

Office: Board of Directors, 1981-82, 1996

Seventh Judicial District Supreme Court Justices' Association

Offices: President, 1992

Vice-President, 1991

Treasurer, 1990

Secretary, 1989

Pre-Trial Services Corp.

Office: Board of Directors, 1991-1994

Monroe County Bar Association

Offices: Bench/Bar Committee, 1994

Ethics Committee, 1994

State Association of Supreme Court Justices

11. **Bar and Court Admission:** List each state and court in which you have been admitted to practice, including dates of admission and any lapses in membership. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

Answer: New York, March 1975-present

12. **Memberships:** List all memberships and offices currently and formerly held in professional, business, fraternal, scholarly, civic, charitable, or other organizations since graduation from college, other than those listed in response to Questions 10 or 11. Please indicate whether any of these organizations formerly discriminated or currently discriminates on the basis of race, sex, or religion - either through formal membership requirements or the practical implementation of membership policies. If so, describe any action you have taken to change these policies and practices.

Answer:

Livingston-Wyoming Assoc. of Retarded Citizens 1982-1986

Livingston Drug and Alcohol Abuse Prevention Council, Past Chairman 1978

Chances and Changes, Board of Directors 1994-1996

(provides safe housing for battered women)

Livonia Ambulance Corp., Driver 1993-present

United Church of Livonia, Board of Trustees 1986-1990

Charles Settlement House, Board of Directors 1990-1993

Myers Foundation, Founder and Director 1989-present

Locust Hill Country Club, 1991-1994

Livonia Basketball Club, Board of Directors 1992-1995

Livonia Little League/Babe Ruth Baseball, Coach 1988-1994

Livonia Youth Soccer, Coach 1985-1989

Geneseo Kiwanis Club, Member 1983-1986*

Livonia Rotary Club, Member 1987-1994**

* The Geneseo Kiwanis Club formerly was a male-only club but now admits women.

** I resigned from the Livonia Rotary Club when it refused to admit a woman (see Board of Directors of Rotary Int'l v Rotary Club of Duarte, 481 US 537 [1987]). Once a woman was admitted to the Club, I rejoined for a brief period of time.

13. **Published Writings**: List the titles, publishers, and dates of books, articles, reports, or other material you have written or edited, including material published on the Internet. Please supply four (4) copies of all published material to the Committee, unless the Committee has advised you that a copy has been obtained from another source. Also, please supply four (4) copies of all speeches delivered by you, in written or videotaped form over the past ten years, including the date and place where they were delivered, and readily available press reports about the speech.

Answer:

Published Works*

When Law and Medicine Collide, __ CORNELL JOURNAL OF LAW & PUBLIC POLICY __ (to be published Spring 2003) [Steinberg Lecture at University of Rochester Medical School]

Hugh Jones and Modern Courts: The Pursuit of Justice Then and Now, 65 ALBANY LAW REVIEW 1123 (2002) [Jones Memorial Lecture at Albany Law School]

New York's Court of Appeals: A Personal Perspective, 48 SYRACUSE LAW REVIEW 1461 (1998)

Developments in Welfare Law -- 1973, 59 CORNELL LAW REVIEW 859 (June 1974)
co-authored with Carol B. Clemons, David Rothenberg and Richard C. White

*see Schedule A for copies of published works.

Speeches**

<u>Title (format)</u>	<u>Location</u>	<u>Date</u>
Eulogy for Tom Downey (Typed speech)	Livonia, NY	2/17/03
NYS Bar Assoc. Family Law Section (Extemporaneous)	Amherst, NY	12/6/02
Alumni speech Cornell/Penn Club (Extemporaneous)	Rochester, NY	11/25/02
Legal Affairs Club SUNY Geneseo (Extemporaneous)	Geneseo, NY	10/28/02

NYS Bar Assoc. Family Law Section (Extemporaneous)	Syracuse, NY	10/25/02
"When Law and Medicine Collide" Steinberg Lecture Series (Typed speech; published work)	Rochester, NY	9/25/02
NYS Bar Assoc. Family Law Section (Handwritten outline)	Manchester, VT	7/11/02
Middle-school students (Extemporaneous)	Livonia Central School	6/17/02
Memorial service - Judge John Callahan (Extemporaneous)	Appellate Division Rochester, NY	4/8/02
"Hugh Jones & Modern Courts: The Pursuit of Justice Then and Now" (Typed speech; published work)	Albany Law School	3/11/02
Speech to pre-law class (Extemporaneous)	Univ. of Albany	3/20/02
Swearing-in ceremony (Extemporaneous)	Rochester, NY	2/28/02
Trial Advocates luncheon (Extemporaneous)	Rochester, NY	12/18/01
Retirement dinner for Judge Fred Henry (Extemporaneous)	Canandaigua, NY	11/30/01
NYS Bar Assoc. Commercial Litigation CLE (Extemporaneous)	Binghamton, NY	11/1/01
Onondaga Co. Bar Assoc. Dinner honoring Judge John Lawton (Extemporaneous)	Syracuse, NY	10/25/01

NYS Bar Assoc. Appellate Advocacy CLE (Extemporaneous)	Batavia, NY	9/15/01
Assoc. of Higher Education Facility Officers (Extemporaneous)	Montreal, Quebec	7/22/01
Rochester Rotary Club "A Free and Independent Judiciary" (Typed speech)	Rochester, NY	7/10/01
NYS Co. Judges' Assoc. Annual meeting (Extemporaneous)	Cooperstown, NY	6/12/01
Onondaga Co. Bar Assoc. Commercial Litigation CLE (Extemporaneous)	Syracuse, NY	5/16/01
Touro Law School Law Review Banquet (Extemporaneous)	Huntington, NY	5/14/01
Albany Co. Bar Assoc. "Chambers Chat" CLE (Extemporaneous)	Albany, NY	4/24/01
American Bd. Of Trial Advocates Judiciary/General Counsel Roundtable (Extemporaneous)	Rochester, NY	11/6/00
NYS Bar Assoc. Commercial Litigation CLE (Extemporaneous)	Rochester, NY	10/25/00
Sullivan Policy Institute Constitution Day Ceremony (Typed speech)	Rochester, NY	9/17/00
Livonia Central School commencement (My son's graduation)	Livonia, NY	6/00

Mt. Morris Central School Business Law class (Extemporaneous)	Mt. Morris, NY	4/11/00
NY Assoc. of Counties' Annual Meeting (Extemporaneous)	Albany, NY	4/4/00
Eulogy for Justice M. Dolores Denman (Typed speech)	Buffalo, NY	1/22/00
Eulogy for Justice John Doerr (Typed speech)	Buffalo, NY	12/4/99
Nathaniel Hawthorne Awards (Typed speech)	Rochester, NY	10/28/99
Jurist in Residence Syracuse Law School "Judges as Problem Solvers" (Typed speech)	Syracuse, NY	10/27/99
SUNY Albany Government & Politics class (Extemporaneous)	Albany, NY	10/20/99
Canisius College Education Law Class (Handwritten outline)	Buffalo, NY	10/6/99
Council of State Governments (Extemporaneous)	New Paltz, NY	9/23/99
"Chambers Chat" Albany Co. Bar Assoc. (Extemporaneous)	Albany, NY	9/7/99
Cornell Law School Alumni (Handwritten outline)	New York, NY	1/29/99
Eulogy - Dr. David Huntington (Typed speech)	Alfred, NY	12/22/98

Monroe Co. Bar Assoc. Criminal Justice Section (Extemporaneous)	Rochester, NY	12/8/98
Orchard Park High School (Extemporaneous)	Orchard Park, NY	11/21/98
Justice David Boehm's retirement dinner (Extemporaneous)	Rochester, NY	10/28/98
NYS Bar Assoc. Seminar (Extemporaneous)	Rochester, NY	9/18/98
Albany Co. Bar Assoc. "Ineffective Appellate Advocacy" (Handwritten outline)	Albany, NY	9/8/98
Monroe Co. Bar Assoc. Trust & Estates Section "A View From Eagle Street" (Handwritten outline)	Rochester, NY	6/12/98
Commencement Address (Typed speech)	University of Buffalo School of Law	5/16/98
Genesee Valley Chapter Civil Liberties Union "What's Not In The Bill of Rights" (Typed speech)	Rochester, NY	12/11/97
Monroe Co. Bar Assoc. Appellate Advocacy CLE (Extemporaneous)	Rochester, NY	11/13/97
Assoc. of Law Libraries of Upstate New York (Extemporaneous)	Albany, NY	10/17/97
NYS Magistrates' Assoc. (Handwritten outline)	Buffalo, NY	9/30/97

American Corporate Counsel Assoc. "Life On The Court of Appeals" (Handwritten outline)	Rochester, NY	9/24/97
Allegany County Bar Assoc. (Extemporaneous)	Belmont, NY	8/8/97
Livonia Central School Commencement (my daughter's graduation) (Handwritten outline)	Livonia, NY	6/97
Eulogy for Judge J. Robert Houston (Typed speech)	Geneseo, NY	6/5/97
Brighton Chamber of Commerce (Handwritten outline)	Rochester, NY	5/22/97
Assoc. of the Bar of the City of NY (Handwritten outline)	New York, NY	5/20/97
Albany Co. Lawyers' Assoc. (Typed speech)	SUNY Albany Albany, NY	5/8/97
Syracuse Law School students (Extemporaneous)	Albany, NY	4/30/97
Albany County Bar Association Court of Appeals Dinner (Extemporaneous)	Albany, NY	2/13/97
Swearing-in ceremony at Court of Appeals (Handwritten outline)	Albany, NY	2/3/97
NYS Bar Foundation "Why Did You Become a Lawyer" (Handwritten notes)	New York, NY	1/97
Genesee Co. Bar Assoc. (Extemporaneous)	Batavia, NY	12/9/96
Livonia Central School Business Law Class (Extemporaneous)	Livonia, NY	11/26/96

F.B.I. Agents Luncheon (Extemporaneous)	Rochester, NY	11/20/96
NYS Bar Assoc. Seminar (Extemporaneous)	Rochester, NY	10/18/96
Dansville Rotary Club (Extemporaneous)	Dansville, NY	9/23/96
Judicial Skills Committee Seminar (Extemporaneous)	Westchester, NY	7/10/96
Law Guardian Seminar 4 th Dept., Appellate Division (Extemporaneous)	Rochester, NY	6/22/96
Rochester Gas & Electric Co. (Extemporaneous)	Portageville, NY	5/1/96
NYS Assoc. of Alternative Sentencing Programs (Extemporaneous)	Albany, NY	4/2/96
Young Lawyers' Orientation 4 th Dept., Appellate Division (Extemporaneous)	Rochester, NY	3/6/96
Finger Lakes Forum Television coverage of criminal trials (Extemporaneous)	Geneva, NY	1995
NYS Bar Assoc. "Appellate Practice in New York" (Extemporaneous)	Rochester, NY	11/95
Judicial Seminar for Newly Elected Judges (Extemporaneous)	New York, NY	12/92
NYS Bar Assoc. "Basic Criminal Practice" (Extemporaneous)	Rochester, NY	9/92

NYS Bar Assoc.
 "How to Settle a Commercial Case"
 (Extemporaneous)

Rochester, NY

5/92

**** see Schedule B for notes and outlines for speeches where noted.**

14. **Congressional Testimony:** List any occasion when you have testified before a committee or subcommittee of the Congress, including the name of the committee or subcommittee, the date of the testimony and a brief description of the substance of the testimony. In addition, please supply four (4) copies of any written statement submitted as testimony and the transcript of the testimony, if in your possession.

Answer: None

15. **Health:** Describe the present state of your health and provide the date of your last physical examination.

Answer: Excellent. I am a marathon runner and have a physical every year. My last physical was in November, 2002.

16. **Citations:** If you are or have been a judge, provide:

- (a) a short summary and citations for the ten (10) most significant opinions you have written;

Answer:

Ten Most Significant Opinions

Case Name/Citation:

1. Hamilton v Beretta U.S.A. Corp.
 (96 NY2d 222 [2001])

Summary:

Plaintiffs sought to hold several handgun manufacturers liable for death or injury caused to persons by illegally obtained handguns. The Court held that the manufacturers did not owe plaintiffs a general duty to exercise reasonable care in the marketing and distribution of their handguns. The Court reasoned that imposition of such a duty would expose defendants to potentially limitless liability, which should not be imposed without a more tangible showing that the manufacturers were a direct link in the causal chain that resulted in plaintiff's injuries and that the manufacturers were realistically in a position to prevent the wrongs.

2. People v Johnson
(95 NY2d 368 [2000])

In this case, the Court was asked to determine whether acts of violence committed against a mother in the presence of her children, notwithstanding that none of the harmful conduct was specifically directed at the children, supported a defendant's convictions for endangering the welfare of a child under Penal Law § 260.10(1). Recognizing the well-documented adverse effects when children are exposed to domestic violence, the Court concluded that the statute was written broadly enough to encompass such indirect conduct because it imposes criminal liability for awareness of the mere "likelihood" of harm to a child.

3. People v Hues
(92 NY2d 413 [1998])

This case called into question the propriety of juror note-taking during trial. The Court held that, based upon the need to respond to contemporary challenges facing our jury system, the overwhelming authority of Federal and other State courts, and "a healthy dose of common sense," it is within the sound discretion of trial courts to allow note-taking by jurors during a trial. If a trial court determines that a particular case warrants note-taking, the court can *sua sponte* instruct jurors that they are permitted to take notes during the trial. This discretion, however, must be tempered, in light of the potential perils that note-taking can present during trial, by cautionary instructions at the commencement and conclusion of the trial as part of the court's charge prior to jury deliberations.

4. Blanco v AT & T Co.
(90 NY2d 757 [1997])

Various products liability lawsuits claiming damages for keyboard related repetitive stress injuries ("RSIs") were consolidated for the purpose of deciding the applicable statute of limitations. The trial court held that the limitations period commenced upon the onset of RSI symptoms, or the plaintiff's last use of a keyboard, whichever was earlier. The Appellate Division modified, holding that actions accrued upon a plaintiff's first use of a keyboard. The Court modified the Appellate Division order, and adopted the onset of symptoms or last use

rule. Noting that past precedents did not adequately deal with this information age injury, the Court held that the onset of symptoms or last use rule was dictated by a fair balancing of the competing interests at stake.

5. In re New York Agency of Bank of
Commerce & Credit Int'l S.A.
(90 NY2d 410 [1997])

As part of his seizure of a local bank, the superintendent seized an account of a foreign bank's funds that were in the local bank. That account had received an electronic transfer at the direction of the foreign bank on that day. The foreign bank had ordered the transfer prior to any seizure of assets pursuant to an agreement reached the previous day. The foreign bank challenged the superintendent's authority to seize the funds. The Court concluded that New York Banking Law §606(4) gave the superintendent sufficiently broad powers to validate the seizure. Years before the seizure, financial officials worldwide were on notice that the local bank was a rogue bank, and that there were substantial risks involved in doing business with it. Thus, the assets were seized because the local bank was in an unsound and unsafe condition and could not safely and expediently continue business. The Court noted that there was no mutual mistake when the contract was signed, and no inequity in treating the foreign bank in the same manner as any other depositor/creditor who was unfortunate enough to have placed its money with the local bank prior to the time it was seized.

6. People v Harris
(98 NY2d 452 [2002])

Defendant was convicted on six first-degree murder counts, attempted first-degree murder and second-degree criminal possession of a weapon. The jury sentenced defendant to death. The Court found that defendant failed to overcome the presumption of constitutionality with respect to New York Criminal Procedure law § 270.20(1)(f), which uses "death qualification" to ensure that prospective jurors are able to consider the death penalty. Further, to the extent the trial court may have forecast the type of individual who could avoid jury service when it described the life/death qualification process, there was no prejudice to

defendant. Finally, defendant failed to make a claim that his for-cause challenge against a juror pursuant to Criminal Procedure Law §270.20(1)(f) should have been granted because he did not correlate the juror's expressed skepticism regarding the mitigating factor of child abuse and the juror's views on the death penalty or her ability to exercise sentencing discretion conferred by statute. Defendant's death sentence was vacated because of controlling precedent under Matter of Hynes v Tomei (92 NY2d 613), which, consistent with Jackson v United States (390 US 570 [1968]), struck the post-death notice plea bargaining provisions of the death penalty statute as unconstitutional.

7. Luna v Dobson
(97 NY2d 178 [2001])

On two occasions, a New York woman went to the courts of Connecticut requesting a declaration of paternity, but both claims were dismissed as a result of a series of missteps by a representative of the Connecticut Attorney General. The woman then brought a paternity action in New York and the child's putative father sought to invoke one of the Connecticut proceedings as a total bar. Applying the Full Faith and Credit Clause, the Court looked to Connecticut law to determine whether the earlier dismissal had preclusive effect. Given Connecticut's strong interest in the identification of parent-child relationships and the unique nature of proof in that regard, the Court held that in this case – where no adjudication of paternity occurred because of governmental missteps – Connecticut law would have deemed the paternity determination more important than the convenience afforded by finality and would not have given the disciplinary dismissal preclusive effect.

8. People v Foley
(94 NY2d 668 [2000])

Posing as a fifteen-year-old girl named "Aimee", a State Trooper logged onto a sex chat room on the Internet. Defendant began corresponding with "Aimee" and sent pictures of what appeared to be children engaging in sexual acts with adults along with his transmissions. Defendant was in the process of arranging a meeting with "Aimee" when he was

arrested. The Court was called upon to determine the constitutionality of New York Penal Law § 235.22, which criminalizes the computerized dissemination of indecent material to minors. The Court rejected defendant's contention that the statute was unconstitutionally overbroad because it exposed individuals to criminal liability who unintentionally address a minor through sexually oriented communication. Recognizing that Penal Law § 235.22 is not directed only at the transmission of certain types of communication over the Internet, the Court noted that the second prong of the statute prohibited conduct – the importuning, invitation, inducement of a minor to engage in sexual acts – as opposed to mere speech. The Court further held that Penal Law § 235.22 is not unconstitutionally vague because a person of ordinary intelligence would reasonably know that the statute is meant to prevent the intentional luring of minors to engage in sexual conduct through the dissemination of harmful sexual images. The Court also determined that the speech-conduct sought to be prohibited by Penal Law § 235.22 did not merit First Amendment protection. Nor did the statute violate the Commerce Clause, distinguishing this provision from § 235.21(3), which banned the sending of a sexually explicit depiction to a minor over the Internet (see American Libraries Assn. v. Pataki, 969 F.Supp 160 (SDNY 1997)). In American Libraries, the district court held that this provision unduly burdened interstate commerce. Finally, the Court of Appeals upheld the constitutionality of Penal Law § 263.15, which prohibits promoting a sexual performance by a child.

9. In re Benjamin I.
(92 NY2d 660 {1999})

The Court held that a juvenile has a right to speedy adjudication under the Due Process Clause of New York's Constitution. Noting that the same policies that precipitated the articulation and enforcement of a criminal defendant's right to a speedy trial are applicable to juveniles in delinquency proceedings, the Court concluded that the speedy trial protections afforded under the Due Process Clause are not for criminal proceedings alone and are not at

odds with the goals of juvenile proceedings. The Court adopted, extended and modified the five factors for determining whether a defendant's speedy trial rights have been violated that were articulated in People v. Taranovich (37 NY2d 442) to the juvenile delinquency context, and directed courts to weigh these factors on a case-by-case basis. However, it cautioned courts to be acutely cognizant of the goals, character and unique value of juvenile proceedings when assessing a speedy trial claim.

10. Tamagni v. Tax Appeals Tribunal
(91 NY2d 530 [1998])

The Tamagni's, who lived in New Jersey but were also statutory residents of New York, having spent more than 183 days here, claimed that New York's income tax violated the dormant Commerce Clause of the Federal Constitution insofar as it allowed their income from intangible assets to be subject to full taxation in both New York and New Jersey. The Court held the New York tax did not trigger Commerce Clause scrutiny because it was based solely on the taxpayer's status as a New York State resident without regard to any economic activities conducted here. In the alternative, the Court held that even if Commerce Clause analysis was applicable, the tax was constitutional because it did not discriminate against interstate commerce, and states have traditionally retained broad powers to tax their own residents.

- (b) a short summary and citations for all rulings of yours that were reversed or significantly criticized on appeal, together with a short summary of and citations for the opinions of the reviewing court; and

Answer:

Rulings Reversed or Significantly Criticized on Appeal
(see Schedule C for copies of unreported decisions)

Case Name/Citation:

1. Hickson v. Gardner
(134 AD2d 930 [4th Dept 1987])

Summary:

Reversed order of Supreme Court (Wesley J.) that denied defendant's motion to dismiss plaintiff's action as abandoned after plaintiff failed to enter and serve trial court's judgment

The Appellate Division held that plaintiff had burden to explain failure to comply with 22 NYCRR 202.48 and failed to show good cause in this case. Note: The Appellate Division decision was later criticized by the Court of Appeals in Funk v. Barry, (89 NY2d 364 [1996]).

Supreme Court decision/order unreported.

2. Clintwood Assoc. v. County of Ontario
(144 AD2d 928 [4th Dept. 1988])

Reversed decision of Supreme Court (Wesley J.) holding that a county resolution violated the gift provision of the New York Constitution. Although no consideration was provided in the resolution, the action relieved the county of administrative problems and responsibilities, which served as consideration.

Supreme Court decision/order unreported.

3. Samper v University of Rochester
(144 AD2d 940 [4th Dept. 1988])

Modified order of Supreme Court (Wesley J.) that dismissed plaintiffs' cause of action against several of the defendants alleging discrimination under Civil Rights Law §§ 40-c and 40-d. Since plaintiffs alleged sufficient facts to sustain a cause of action under the Human Rights Law against those defendants, the cause of action under the Civil Rights Law was reinstated.

- Samper v Univ. of Rochester
(139 Misc2d 580 [1987])

Dr. Samper sued the University of Rochester and several doctors alleging the defendants discriminated against her based on gender during her residency in anesthesiology. Supreme Court (Wesley J.) denied in part defendants' motion for summary judgment. The court held plaintiffs alleged sufficient facts to create a question of fact as to whether the defendants discriminated against Dr. Samper on the basis of gender and therefore violated the Human Rights Law. The court rejected defendants' claims that the conduct was protected under the Education Law (§ 6527), which immunizes conduct done in evaluating a physician's work. While evaluations are immune, discrimination based on sex is not. The court also rejected defendants' claims that their conduct occurred in an educational context as opposed to an employment relationship. The court noted that Dr. Samper's residency had both

an educational and employment component. Since it was difficult to separate the two, the court reasoned that the protection of the anti-discrimination statute could apply and summary judgment was inappropriate. On appeal, the Appellate Division agreed with that determination.

4. Kost v. Schiefen Construction, Inc.
(155 AD2d 909 [4th Dept. 1989])

Supreme Court decision/order unreported.

Modified ruling of Supreme Court (Wesley J.) that dismissed breach of contract cause of action against some defendants and limited recovery on counterclaims to the amount shown on the invoices.

5. Paros, Inc. v. Vogt
(156 AD2d 928 [4th Dept. 1989])

Supreme Court decision/order unreported.

Reversed order of Supreme Court (Wesley J.) that granted defendant's summary judgment motion in a legal malpractice action. The Appellate Division held that the lower court's conclusion that the plaintiffs caused their own damages was based on a determination of credibility and plaintiffs' testimony raised a question of fact. Thus, summary judgment was inappropriate.

6. Tymkin v. Edwards
(158 AD2d 973 [4th Dept. 1990])

Supreme Court decision/order unreported.

Reversed order of the Supreme Court (Wesley, J.) that denied defendant's motion to dismiss. The Appellate Division held plaintiff failed to properly serve defendant because summons was served at place where defendant no longer resided.

7. Rohr v. Hoyt
(159 AD2d 980 [4th Dept. 1990])

Supreme Court decision/order unreported.

Reversed order of Supreme Court (Wesley, J.) that denied defendants' motion for summary judgment. Defendants met their burden of showing as a matter of law that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102. Plaintiff failed to meet her burden of submitting evidence sufficient to raise a question of fact.

8. Backus v. Planned Parenthood of Finger Lakes, Inc.
(161 AD2d 1116 [4th Dept. 1990])

Reversed order of Supreme Court (Wesley, J.) that denied defendants' motion to dismiss plaintiff's complaint that alleged a claim of breach of an employment contract and related matters. In the Appellate Division's view, the facts alleged by the plaintiff-employee fell short of establishing the tort of intentional infliction of emotional distress because the conduct did not meet the strict standard of extreme and outrageous conduct. Facts also fell short of establishing breach of an employment contract. Furthermore, one defendant's motion to dismiss should have been granted because there was no evidence of interference with a contractual relationship.

Supreme Court decision/order unreported.

9. Green v. Green
(170 AD2d 1026 [4th Dept. 1991])

Reversed order of Supreme Court (Wesley, J.) that concluded the motion to fix attorney's fees was for enforcement of an attorney's charging lien under section 475 of the Judiciary Law.

Supreme Court decision/order unreported.

10. Eisenhart v. Marketplace
(176 AD2d 1220 [4th Dept. 1991])

Reversed order of Supreme Court (Wesley, J.) that granted defendants' motion for summary judgment. The Appellate Division ruled that defendants failed to show as a matter of law that the common area was not inherently dangerous. The Appellate Division concluded that even though defendants complied with building construction code, a jury could find the area inherently dangerous.

Supreme Court decision/order unreported.

11. Dignan v. Dignan
(156 AD2d 995 [4th Dept. 1989])

Modified order of Supreme Court (Wesley, J.) that directed husband's law firm to disclose to defendant its federal and state partnership tax returns. Because the husband's interest in his law firm was limited to his capital account, the partnership agreement provided defendant with the necessary information (*see Burns*, 193 AD2d 1104, below at #12).

Supreme Court decision/order unreported.

12. Burns v. Burns
(193 AD2d 1104 [4th Dept. 1993])

Modified judgment of Supreme Court (Wesley, J.). The Appellate Division reduced the maintenance award to wife and gave husband a credit for the payments made by him from his separate property on several loans. This decision was later modified in part, affirmed in part and remanded by the Court of Appeals (Burns v. Burns (84 NY2d 369 [1994])). In that decision the Court specifically rejected an earlier line of cases in which the Fourth Department, Appellate Division, held that a partner's interest in his or her law firm is limited to the partner's capital account (see Dignan, 156 AD2d 995, above at #11). The Court of Appeals noted "[a]lthough Supreme Court [Wesley, J.] limited plaintiff's proof of defendant's interest in the firm to the value of his capital account, it did so on constraint of Appellate Division decisions which construed the same partnership agreement in the context of other cases" (Burns, 84 NY2d at 373). The Court of Appeals specifically rejected this view.

Supreme Court decision containing findings of fact and conclusions of law is sealed pursuant to New York Domestic Relations Law § 235(1).

13. O'Brien v. O'Brien
(195 AD2d 993 [4th Dept. 1993])

Modified judgment of Supreme Court (Wesley, J.) that awarded child support retroactive only to July 1, 1990 rather than to May 15, 1989, the date of commencement of the action.

Supreme Court decision containing findings of fact and conclusions of law is sealed pursuant to New York Domestic Relations Law § 235(1).

14. People v. Brown
(195 AD2d 1055 [4th Dept. 1993])

Reversed judgment of Supreme Court (Wesley, J.) that convicted defendant of murder in the second degree. Defendant's absence from an in-camera hearing deprived him of his statutory right to be present during all material stages of the trial. The Appellate Division suppressed defendant's statements.

Supreme Court decision/order unreported.

15. People v. Young
(195 AD2d 1041 [4th Dept. 1993])

Reversed judgment of Supreme Court (Wesley, J.) because defendant's absence from the in-camera hearing violated his statutory right to be present at all material stages of his trial.

Supreme Court decision/order unreported.

16. Clarke v De John
(198 AD2d 818 [4th Dept. 1993])

Reversed order of Supreme Court (Wesley, J.) denying defendant's summary judgment motion. In New York, police officers and firefighters cannot sue third parties when the third party's negligence causes the police officer or firefighter injury if the injury occurs in the line of duty. The lower court, relying on several appellate court cases, held that the rule was not applicable in this case because the negligent conduct that caused plaintiff's injury was "separate and distinct" from the circumstances that brought him to the scene. The Appellate Division ruled that a Court of Appeals decision (see Cooper v City of New York, 81 NY2d 584 [1993]), decided after the motion at Supreme Court, but before the appeal, rejected this exception.

Supreme Court decision/order unreported.

17. People v Tindale
(198 AD2d 889 [4th Dept. 1993])

Reversed judgment of Supreme Court (Wesley, J.) that accepted defendant's guilty plea to escape in the second degree. The lower court erred in accepting the plea because defendant's factual allocution negated an essential element of escape in the second degree.

Reversal premised on plea allocution, thus there was no ruling or decision from Supreme Court [Wesley, J].

(c) a short summary of and citations for all significant opinions on federal or state constitutional issues, together with the citation for appellate court rulings on such opinions.

If any of the opinions or rulings listed were in state court or were not officially reported, please provide copies of the opinions.

Answer:

Significant Opinions on Federal and State Constitutional Issues

Case Name/Citation:Summary:

1. People v Hansen
(2003 N.Y. LEXIS 122 {2003})

Defendant was convicted of murder in the first degree and robbery in the first degree, both non-capital offenses. Defendant contended that CPL § 400.27(1), as it applied to sentencing in a non-capital case, deprived him of his constitutional rights of due process under both the State and Federal constitutions as it did not provide for a separate sentencing hearing at which he could submit evidence of mitigating factors. Although defendant argued for procedural standards in non-capital cases similar to those in capital cases, the Court rejected his effort. The Court found New York's sentencing scheme clearly met due process requirements. Specifically, a sentencing hearing was held and defendant's concerns were put forward in a pre-sentencing memorandum. At no time did defendant claim his sentence was based on materially untrue assumptions or misinformation, or that he lacked the notice or opportunity to contest the facts upon which the sentencing court relied. Consequently, § 400.27(1) afforded defendant all the process he was due.

2. People v Berroa
(2002 N.Y. LEXIS 3581 {2002})

Defendant was indicted for murder in the second degree and related offenses stemming from a killing. At trial, defense counsel pursued a misidentification defense. Two defense witnesses testified not only that defendant did not match the description given by the eye-witnesses, but also suggested an unnoticed alibi. Contrary to defense counsel's earlier statements to the court, the witnesses testified to informing counsel of the alibi information before trial. In an attempt to remedy this situation, defense counsel offered a stipulation that was read to the jury indicating the witnesses had not previously informed her of the alibi information. Defendant was found guilty of murder in the second degree. Because defense counsel's stipulation did not support defendant's best

defense or soften damaging evidence, the Court found that the stipulation put defense counsel's credibility in direct conflict with her client's interests and rendered her representation ineffective.

3. People v Harris
(98 NY2d 452 [2002])

Defendant was convicted on six first-degree murder counts, attempted first-degree murder and second-degree criminal possession of a weapon. The jury sentenced defendant to death. The Court found that defendant failed to overcome the presumption of constitutionality with respect to New York Criminal Procedure Law § 270.20(1)(f), which uses "death qualification" to ensure that prospective jurors are able to consider the death penalty. Further, to the extent the trial court may have forecast the type of individual who could avoid jury service when it described the life/death qualification process, there was no prejudice to defendant. Finally, defendant failed to make a claim that his for-cause challenge against a juror pursuant to Criminal Procedure Law § 270.20(1)(f) should have been granted because he did not correlate the juror's expressed skepticism regarding the mitigating factor of child abuse to the juror's views on the death penalty or her ability to exercise the sentencing discretion conferred by statute. Defendant's death sentence was vacated because of controlling precedent under Matter of Hynes v Tomej (92 NY2d 613), which, consistent with Jackson v United States (390 US 570 [1968]), struck the post-death notice plea bargaining provisions of the death penalty statute as unconstitutional.

4. Luna v Dobson
(97 NY2d 178 [2001])

On two occasions a New York woman went to the courts of Connecticut requesting a declaration of paternity, but both claims were dismissed as a result of a series of missteps by a representative of the Connecticut Attorney General. The woman then brought a paternity action in New York and the child's putative father sought to invoke one of the Connecticut proceedings as a total bar. Applying the Full Faith and Credit Clause, the Court looked to Connecticut law to determine whether the

earlier dismissal had preclusive effect. Given Connecticut's strong interest in the identification of parent-child relationships and the unique nature of proof in that regard, the Court held that in this case – where no adjudication of paternity occurred because of governmental missteps – Connecticut law would have deemed the paternity determination more important than the convenience afforded by finality and would not have given the disciplinary dismissal preclusive effect.

5. People v DePallo
(96 NY2d 437 [2001])

Defense counsel, who was unable to dissuade his client from testifying falsely, disclosed the client's perjury in an ex parte appearance before the trial court. The Court rejected defendant's claim that he was denied the effective assistance of counsel because a defendant has no right to commit perjury and no right to the assistance of counsel in the presentation of perjured testimony. The Court held that when an attorney is confronted with this problem at trial, revelation to the court is a professionally responsible and appropriate response, particularly because the intent to commit a crime is not a protected confidence or secret. The lawyer's actions properly balanced the duties he owed to the client and to the courts.

6. People v Jones
(96 NY2d 213 [2001])

Based on the allegations of an undercover officer, defendant and codefendant were arrested and charged with sale and possession of crack-cocaine in Brooklyn. At trial, the People moved to close the courtroom during the undercover officer's testimony. The court conducted a hearing where the officer stated there were 10 "lost subjects" still on the street and she had received threats in the past. In addition, defendant was still at large. A guard was posted at the door to question potential observers. Everyone who sought entrance into the courtroom was allowed in. Applying the standard enunciated in *Waller v Georgia* (467 US 39 [1984]), the Court determined that the trial court had taken the factors set forth in that case into consideration and had narrowly tailored a solution. The restriction of the public's access to the courtroom did not violate

defendant's right to a public trial.

7. Tenn. Gas Pipeline Co. v Urbach
(96 NY2d 124 [2001])

Tennessee Gas challenged the constitutionality of New York Tax Law § 189, which recaptures taxes on natural gas from end users in the State who buy gas directly from out-of-state producers and thereby avoid the taxes passed through by in-state utilities in the rates charged to customers under New York Tax Law §§ 186 and 186-a. The Court held that the import tax was a valid compensatory tax under the Commerce Clause, comparing the statutory scheme to permissible sales and use taxes. However, the Court concluded that the import tax was nevertheless facially unconstitutional because it ran afoul of the internal consistency test for determining "fair apportionment" (*see Oklahoma Tax Comm'n v Jefferson Lines*, 514 US 175 [1995]). In this case a double tax burden would be imposed on interstate commerce because the import tax contains no credit for taxes assessed on the purchase of gas out-of-state. The Court also held invalid the Legislature's attempt to include a savings clause in the enactment language providing a credit for any double taxation because that clause improperly required the Court to define the parameters of the credit and the manner in which it would be implemented in violation of fundamental separation of powers principles.

8. City of New York v State of New York, et al.
(94 NY2d 577 [2000])

The City of New York has, for over three decades, imposed a tax on nonresident commuters who work in the City. In 1999, the Legislature attempted to rescind the tax for State resident commuters while retaining the tax for out-of-State commuters. Anticipating challenges to the statute, the Legislature added a provision that if a court declared the new law void, the entire tax authorization was repealed. The City of New York, the State of Connecticut and other taxpayers brought separate suits challenging the validity of the 1999 enactment. The City's challenge sought to undo the entire 1999 enactment and preserve the tax in its pre-1999 form on the ground that the statute was enacted in violation of the home rule provisions of the State Constitution. The other suit,

brought by residents of New Jersey and Connecticut and by the State of Connecticut, sought termination of the commuter tax on the ground that the taxing scheme as amended in 1999 violated the Federal Constitution. The Court rejected the City's argument that the 1999 amendment violated the Home Rule provision of the New York Constitution. As for the challenge brought by non-State entities, the Court determined that the remaining tax scheme denied nonresidents one of the privileges and immunities of New York residents and accordingly violated article IV, § 2 of the United States Constitution. The Court also held that the tax imposed an undue burden on interstate commerce thereby violating the Commerce Clause of the Federal Constitution. Thus, the commuter tax was repealed in its entirety.

9. People v Wood
(95 NY2d 509 [2000])

Defendant's ex-wife obtained two separate orders of protection directing defendant to have "no contact whatsoever" with her. One order was issued by City Court and the other by Family Court. At issue was whether defendant's prosecution for criminal contempt in the first degree under New York Penal Law § 215.51(c) was barred by the Double Jeopardy Clause because he was previously prosecuted for contempt under Family Court Act article 8 for the same acts of harassment. Noting this unique double jeopardy situation had its genesis in the parallel family offense jurisdiction of Family Court and the criminal courts, the Court applied the traditional test under Blockburger v United States (284 US 299, 304 [1932]) for determining whether the prosecutions were for the same offense. The Court concluded that the contempt provision of Family Court Act article 8 was a lesser included offense of first degree criminal contempt and, thus, defendant's second prosecution was barred.

10. People v Foley
(94 NY2d 668 [2000])

Posing as a fifteen-year-old girl named "Aimee", a State Trooper logged onto a sex chat room on the Internet. Defendant began corresponding with "Aimee" and sent pictures of what appeared to be children engaging in sexual acts with adults along with his

transmissions. Defendant was in the process of arranging a meeting with "Aimee" when he was arrested. The Court was called upon to determine the constitutionality of New York Penal Law § 235.22, which criminalizes the computerized dissemination of indecent material to minors. The Court rejected defendant's contention that the statute was unconstitutionally overbroad because it exposed individuals to criminal liability who unintentionally address a minor through sexually oriented communication. Recognizing that Penal Law § 235.22 is not directed only at the transmission of certain types of communication over the Internet, the Court noted that the second prong of the statute prohibited conduct – the importuning, invitation, inducement of a minor to engage in sexual acts – as opposed to mere speech. The Court further held that Penal Law § 235.22 is not unconstitutionally vague because a person of ordinary intelligence would reasonably know that the statute is meant to prevent the intentional luring of minors to engage in sexual conduct through the dissemination of harmful sexual images. The Court also determined that the speech-conduct sought to be prohibited by Penal Law § 235.22 did not merit First Amendment protection. Nor did the statute violate the Commerce Clause, distinguishing this provision from § 235.21(3), which banned the sending of a sexually explicit depiction to a minor over the Internet (see American Libraries Assn. v. Pataki, 969 F.Supp 160 [SDNY 1997]). In American Libraries, the district court held that this provision unduly burdened interstate commerce. Finally, the Court of Appeals upheld the constitutionality of Penal Law § 263.15, which prohibits promoting a sexual performance by a child.

11. Merlino v. Schneider
(93 NY2d 477 [1999])

Petitioner took an examination to apply for the position of a Spanish-speaking probation officer, but failed the oral portion of the exam. Petitioner's administrative appeals were denied, as was her initial judicial appeal. The Court held that under article V, section 6 of the New York State Constitution oral examinations had to employ objective standards as far as

practicable. Though a completely objective exam was not possible to measure petitioner's language proficiency, the oral exam petitioner took used clearly delineated standards that were capable of being challenged and reviewed by other examiners. Though certain subjective elements entered into petitioner's evaluation, they were insufficient to render the entire examination improper. Because the examination met constitutional standards of competitiveness and was reasonable in testing for the skills required for the position, it was valid.

12. In re Benjamin L.
(92 NY2d 660 [1999])

The Court held that a juvenile has a right to speedy adjudication under the Due Process Clause of New York's Constitution. Noting that the same policies that precipitated the articulation and enforcement of a criminal defendant's right to a speedy trial are applicable to juveniles in delinquency proceedings, the Court concluded that the speedy trial protections afforded under the Due Process Clause are not for criminal proceedings alone and are not at odds with the goals of juvenile proceedings. The Court adopted, extended and modified the five factors for determining whether a defendant's speedy trial rights have been violated that were articulated in People v Taragovich (37 NY2d 442) to the juvenile delinquency context, and directed courts to weigh these factors on a case-by-case basis. However, it cautioned courts to be acutely cognizant of the goals, character and unique value of juvenile proceedings when assessing a speedy trial claim.

13. Tamagni v Tax Appeals Tribunal
(91 NY2d 530 [1998])

The Tamagni's, who lived in New Jersey but were also statutory residents of New York, having spent more than 183 days here, claimed that New York's income tax violated the dormant Commerce Clause of the Federal Constitution insofar as it allowed their income from intangible assets to be subject to full taxation in both New York and New Jersey. The Court held the New York tax did not trigger Commerce Clause scrutiny, because it was based solely on the taxpayer's status as a New York State resident, without regard to any

economic activities conducted here. In the alternative, the Court held that even if Commerce Clause analysis was applicable, the tax was constitutional, because it did not discriminate against interstate commerce, and states have traditionally retained broad powers to tax their own residents.

14. People v Burdo

(91 NY2d 146 [1997] [Wesley, J., dissenting])

Defendant was in custody at a county jail pursuant to a pending charge of rape and assault and had been assigned legal representation following his arraignment. The officers who questioned defendant about an unrelated matter were fully aware of these facts and proceeded to interrogate the defendant. The Court held that under the circumstances, the custodial interrogation was improper and defendant's statements made during questioning must be suppressed because defendant was represented by counsel on the charge on which he was held in custody and could not be interrogated in the absence of counsel on any matter. The Court relied on prior precedent, People v Rogers (48 NY2d 167) for its ruling. In dissent, Judge Wesley argued that before the protections of Rogers become available, a defendant must establish an actual attorney-client relationship or an invocation of his right to counsel under the Fifth Amendment of the United States Constitution and article I, section 6 of the New York State Constitution. The dissent reviewed New York's extensive case law in this area and noted that a number of previous decisions of the Court of Appeals had confused the difference between one's right to counsel associated with the Fifth Amendment and the right to counsel under the Sixth Amendment and the State constitutional corollaries. (see N.Y. Const., art. I, § 6).

15. Park Slope Jewish Ctr. v Congregation B'Nai Jacob

(90 NY2d 517 [1997])

One religious congregation sued another seeking payment for use and occupancy of a portion of the synagogue they shared under the terms of an in-court stipulation. Although the lower courts had concluded the case presented a nonjusticiable religious dispute, the Court of Appeals reversed and held the dispute could be resolved by the application of "neutral

principles of law" under the secular terms of the stipulation that had resolved the parties' prior religious disagreement.

16. People v Vasquez and Matter of Cordero v Lalor
(89 NY2d 521 [1997])

Appellants in both cases argued that the Double Jeopardy Clause barred criminal prosecution of inmates who had previously been the subject of internal prison disciplinary sanctions. The Court affirmed the judgments and concluded that the disciplinary sanctions imposed did not constitute criminal punishment that triggered double jeopardy protections. The Court explicitly held that the Double Jeopardy Clause did not bar criminal prosecution of a prison inmate simply because the inmate was previously subjected to internal prison disciplinary action for the same conduct. The test was whether disciplinary sanctions were intended to constitute criminal punishment, and, assuming they were not, whether they were so grossly unrelated to the noncriminal governmental objectives at stake in a prison environment that they could only be viewed as criminal punishment. The Court was satisfied that prison disciplinary rules were intended to serve legitimate noncriminal objectives. The sanctions were aimed at the terms and conditions of the sentences being served and were not harsh or extreme.

17. Anello v Zoning Bd. of Appeals
(89 NY2d 535 [1997] [Wesley, J., dissenting])

Appellant contended that the denial of a variance, which prevented her from building a one-family dwelling on her parcel, constituted a taking of property for which she was entitled to just compensation. On appeal, the Court held that appellant's takings claim failed because she never acquired an unfettered right to build on the property free from the steep-slope ordinance. Appellant purchased the property in 1991, two years after the steep-slope ordinance was enacted. This statutory restriction thus encumbered appellant's title from the outset of her ownership and its enforcement did not constitute a governmental taking of any property interest owned by her. In a dissenting opinion, Judge Wesley wrote that the transfer should not make a once-compensable taking noncompensable. In a later case, the U.S.

Supreme Court took a similar position (see Palazzolo v Rhode Island, 533 US 606, 628 (2001)).

18. People v Bedell
(210 AD2d 922 [4th Dept 1994])

Defendant argued that her sentence was invalid as a matter of law because her continued incarceration through the minimum term of 25 years violated the constitutional proscription against cruel and unusual punishment. The defendant did not seek the reduction premised upon a constitutional attack on the sentence as originally imposed. Agreeing with the majority that the sentence should not be reduced, Judge Wesley reasoned that the court's authority to examine the constitutional dimensions of a State-imposed sentencing scheme is limited to weighing the gravity of the offense against the danger the offender poses to society at the time the sentence is imposed. There is no authority that permits a mid-sentence constitutional assessment because of the defendant's good behavior in jail. That power is reserved to the Governor through clemency proceedings.

-
17. Public Office, Political Activities and Affiliations:

- (a) List chronologically any public offices you have held, federal, state or local, other than judicial offices, including the terms of service and whether such positions were elected or appointed. If appointed, please include the name of the individual who appointed you. Also, state chronologically any unsuccessful candidacies you have had for elective office or nominations for appointed office for which were not confirmed by a state or federal legislative body.

Answer:

Member, New York State Assembly – 136th District
Elected November, 1982; re-elected November, 1984

- (b) Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

Answer:

I have never played a role in a political campaign other than my own candidacy for New York State Assembly and New York State Supreme Court.

18. Legal Career: Please answer each part separately.

- (c) Describe chronologically your law practice and legal experience after graduation from law school including:
- (1) whether you served as clerk to a judge, and if so, the name for the judge, the court and dates of the period you were a clerk;
 - (2) whether you practiced alone, and if so, the addresses and dates;
 - (3) the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been affiliated, and the nature of your affiliation with each.

Answer:

Law Practice and Legal Experience:

8/74 to 3/76	Harris, Beach & Wilcox 99 Garisey Road Pittsford, NY 14534 <u>Title:</u> Associate Attorney
3/76 to 1/77	Welch, Streb & Porter 131 Main Street Geneseo, New York 14454 <u>Title:</u> Associate Attorney
1/77 to 1/83	Welch, Streb, Porter, Meyer & Wesley 131 Main Street Geneseo, New York 14454 <u>Title:</u> Partner
1/79 to 6/82	New York State Assembly Capitol Building Albany, New York 12248 <u>Title:</u> Assistant to Minority Leader
1/83 to 1/87	Streb, Porter, Meyer & Wesley 131 Main Street Geneseo, New York 14454 <u>Title:</u> Partner

1/87 to 4/94	Supreme Court, Seventh Judicial District Hall of Justice Rochester, New York 14614-2186 <u>Title:</u> Justice Supervising Judge, Criminal Courts - 7 th Judicial District (1/91-3/94)
4/94 to 12/96	Appellate Division of Supreme Court, Fourth Dept. 50 East Ave., Suite 200 Rochester, New York 14604 <u>Title:</u> Additional Justice
1/97 to present	New York State Court of Appeals 20 Eagle Street Albany, New York 12207 <u>Title:</u> Associate Judge

- (d) (1) Describe the general character of your law practice and indicate by date if and when its character has changed over the years.

Answer: I worked primarily in civil and criminal litigation with a focus on tort litigation as a plaintiffs' lawyer. I also handled a number of products liability and contract defense cases. My work in the Assembly focused on drafting legislation for the Minority Leader and reviewing bills before the Assembly.

- (2) Describe your typical former clients, and mention the areas, if any, in which you have specialized.

Answer: Private individuals who were injured in accidents. I also did a good deal of matrimonial law. I did represent the Butler Mfg. Co. (a manufacturer of agricultural buildings) in a number of cases involving barn failures or contract disputes.

- (e) (1) Describe whether you appeared in court frequently, occasionally, or not at all. If the frequency of your appearances in court varied, describe each such variance, providing dates.

Answer: Frequently – on a weekly basis.

- (2) Indicate the percentage of these appearances in

- (A) federal courts;
- (B) state courts of record;
- (C) other courts.

Answer: 99% State courts; 1% Federal courts (bankruptcy only)

- (3) Indicate the percentage of these appearances in:

- (A) civil proceedings;
- (B) criminal proceedings.

Answer: 80% Civil; 20% Criminal

- (4) State the number of cases in courts of record you tried to verdict or judgment rather than settled, indicating whether you were sole counsel, chief counsel, or associate counsel.

Answer: I do not have the records to establish this since it was over 16 years ago. However, I had many divorce and other non-injury trials. I did try two jury trials to verdict; one as lead counsel and one as associate counsel.

- (5) Indicate the percentage of these trials that were decided by a jury.

Answer: see (4) above.

- (d) Describe your practice, if any, before the United States Supreme Court. Please supply four (4) copies of any briefs, amicus or otherwise, and, if applicable, any oral argument transcripts before the U.S. Supreme Court in connection with your practice.

Answer: None.

- (e) Describe legal services that you have provided to disadvantaged persons or on a *pro bono* basis, and list specific examples of such service and the amount of time devoted to each.

Answer: I took *pro bono* referrals from a local referral agency, although I do not have any records to provide specific information as to examples and amount of time devoted. While I was a second-year law student I assisted the Monroe County Legal Assistance Corporation in the preparation of a brief for an appeal to the 2nd Circuit (see Warth v Seldin, 495 F2d 1187 [2d Cir. 1974]). I also did *pro bono* work for Chances & Changes, a shelter for battered women.

19. Litigation: Describe the ten (10) most significant litigated matters which you personally handled, and for each provide the date of representation, the name of the court, the name of the judge or judges before whom the case was litigated and the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties. In addition, please provide the following:

- (a) the citations, if the cases were reported, and the docket number and date if unreported;
- (b) a detailed summary of the substance of each case outlining briefly the factual and legal issues involved;
- (c) the party or parties whom you represented; and
- (d) describe in detail the nature of your participation in the litigation and the final disposition of the case.

Answer:

Most of my general civil and criminal litigation practice was focused on addressing legal issues facing citizens of a small community. My practice was also reduced during my years serving as a Member of the New York State Assembly. The records of my former firm have been destroyed. I am able, however, to provide a limited list of cases drawn

from a similar list I prepared in 1986 at the request of the Governor's Judicial Screening Committee.

(1) In re Ralph L. Button, Jr. v Sheridan Oil Co. Inc.

Date of Representation: June 15, 1979 - March 2, 1982

Court: United States Bankruptcy Court for the Western District of New York

Judge: Hon. Edward D. Hayes

Counsel:

John A. Ward, counsel for plaintiff
170 Main Street
Groton, New York 13073
(607) 893-3190

(a) This case is reported at 18 B.R. 171 (WDNY 1982).

(b) Button stole money from Sheridan Oil Company and was sentenced to probation with restitution. He then filed a bankruptcy petition and obtained a discharge of the underlying debt. When he stopped paying restitution, a violation of probation proceeding ensued. In lieu of going to jail, he reaffirmed the debt thus satisfying the terms of his probationary sentence. He defaulted on the new note. The Bankruptcy Court ruled that the note was not the same debt as that discharged in the bankruptcy proceeding, as it was supported by new consideration, Sheridan's willingness to accept the new note as satisfaction of the restitution requirement of the criminal sentence.

(c) I represented the defendant, Sheridan Oil Company Inc.

(d) I was Sheridan Oil Company's counsel throughout this proceeding.

(2) Gerald Hilliman and Fay Hilliman v Agtron Steel Builders, Inc., et al.

Date of Representation: September 30, 1982 - January 1, 1987

Court: State of New York, County of Cattaraugus, Supreme Court

Judge: None Assigned

Counsel:

John J. Cotter, Jr., counsel for defendant Agtron
298 Main Street
Buffalo, New York 14202
(716) 854-4062

Pusatier, Sherman, White & London
Kenneth S. Sherman, counsel for plaintiff (deceased)
2464 Elmwood Avenue
Kenmore, New York 14217
(716) 873-6765

(a) This case was not reported.

(b) This case involved a claim arising out of the failure of a barn roof that destroyed a number of dairy cows.

(c) I represented defendant Butler Manufacturing Company.

(d) I drafted all responsive pleadings and participated in discovery. The case was not completed prior to my taking the bench.

(3) People v Edward Harvey,

Date of Representation: September 26, 1984 - January 1985

Court: State of New York, County of Livingston, County Court

Judge: Hon. James Orman, Avon Town Justice
Hon. Ronald A. Cicoria

Counsel:

Livingston County District Attorney
Theodore E. Wiggins (deceased)
Livingston County Courthouse
Geneseo, New York 14454
(585) 243-0110

(a) The case was not reported.

(b) Harvey was charged with disorderly conduct. He was convicted following a non-jury trial in justice court. On appeal, his conviction was affirmed.

(c) I represented defendant Edward Harvey.

(d) My participation in this matter included defense of the charges at trial and on appeal.

(4) M/O Paternity Proceeding, Gordon D. Shepard, Jr. v Diane M. Parsons,

Date of Representation: November 21, 1985 - January 1987

Court: State of New York, County of Livingston, Family Court

Judge: Hon. J. Robert Houston (deceased)

Counsel:

James McCann attorney for Respondent, Diane M. Parsons
9 Genesee Street
Avon, New York 14414
(585) 226-2040

(a) The case was not reported.

(b) Mr. Shepard was attempting to establish his paternity with regard to Ms. Parson's child.

(c) I represented the petitioner, Gordon D. Shepard, Jr.

(d) I drafted all pleadings and conducted the discovery.

(5) Michael L. Visale and Rosalie J. Vasile v Suburban Propane Gas Corp., et. al,

Date of Representation: December 12, 1995 - January 1987

Court: State of New York, County of Livingston, Supreme Court

Judge: None assigned

Counsel:

Reed, Smith, Shaw & McClay
Richard C. Wesley -- local counsel
Counsel for defendant Suburban Propane
1150 Connecticut Avenue, N.W.
Suite 900
Washington, D.C. 20036
(202) 457-6100

Osborne, Reed, VanDeVate & Burke
Jeffrey M. Wilkens, counsel for defendant Fisher Controls
1 Exchange Street -- 4th Floor
Rochester, New York 14614
(585) 454-6480

George G. Mackey, counsel for defendant Perfection Manufacturing
28 East Main Street, Suite 800
Rochester, New York 14614
(585) 325-7570

Harter, Secrest & Emery, counsel for defendant Honeywell, Inc.
700 Midtown Tower
Rochester, New York 14604
(585) 232-6500

Faraci & Lange
John A. Bryant, counsel for plaintiff (deceased)
309 Times Square Building
Rochester, New York 14614
(585) 325-5150

(a) This case was not reported.

(b) This case involved the explosion of a liquid propane gas space heater.

(c) I represented defendant Suburban Propane Gas Corporation.

(d) I prepared all pleadings and conducted discovery on behalf of my client in consultation with Washington counsel.

(6) Donna C. Felstead v The County of Ontario, et. al.

Date of Representation: July 8, 1985 - March 20, 1986

Court: State of New York, County of Ontario, Supreme Court

Judge: Hon. Frederic T. Henry (retired)

Counsel:

Gary H. Abelson, counsel for defendant Town of East Bloomfield
28 East Main Street, Suite 800
Rochester, New York 14614
(585) 325-7570

Osborn, Considine, Reed, VanDeVale and Burke
Jeffrey M. Wilkens, counsel for defendant County of Ontario
1 Exchange Street – 4th Floor
Rochester, New York 14614
(585) 454-6480

Rollins and Mulroy
J. Kevin Mulroy, counsel for defendant Rayburns
216-220 South Warren Street
Syracuse, New York 13202
(315) 472-2688

(a) This case was not reported.

(b) Ms. Felstead's son was killed in an auto accident involving a jeep.

(c) I represented plaintiff Donna C. Felstead, as Administratrix of the Estate of Paul J. Smith.

(d) My participation included preparation of all pleadings and supervising discovery. When the case settled, I drafted the relevant papers and sought court approval of the settlement.

(7) Daniel Bowen v Hansen and Bone, M.D., P.C., et al.

Dates of Representation: April 21, 1982 - October 4, 1984

Court: State of New York, County of Livingston, Supreme Court

Judge: Hon. Richard D. Rosenbloom

Counsel:

Dennis R. McCoy, counsel for the defendants
3 Fountain Plaza
Buffalo, New York 14203
(716) 856-5400

(a) This case was unreported.

(b) This case involved a medical malpractice action.

(c) I represented the plaintiff, Daniel Bowen.

(d) My participation in this case involved preparing all pleadings and conducting discovery.

(8) Mary E. Fox v Donald A. Fox,

Dates of Representation: August 30, 1985 - October 24, 1985

Court: State of New York, County of Monroe, Supreme Court

Judge: Hon. Ronald A. Cicoria

Counsel:

Louis J. Colella, P.C.
Counsel for plaintiff
88 Ossian Street
Dansville, New York 14437
(716) 335-3168

- (a) This case was not reported.
- (b) This case was a matrimonial action.
- (c) I represented the defendant, Donald A. Fox.
- (d) I prepared all pleadings and relevant documents and conducted discovery. I also prepared the stipulation and judgment roll when the matter was settled.

(9) Howard Communications, Inc. v Genesee Valley Broadcasting, Inc. et. al.
Date of Representation: September 9, 1983 - May 21, 1984

Court: State of New York, County of Erie, Supreme Court

Judge: Hon. Frederick M. Marshall

Counsel:
 Summner, Kolken & Collesano
 Counsel for plaintiff
 Suite 1300
 Statler Building
 107 Delaware Avenue
 Buffalo, New York 14202
 (716) 854-1541

- (a) This case was not reported.
- (b) As best I can recall, this case involved a contract claim. The matter was dismissed.
- (c) I represented the defendants, Genesee Valley Broadcasting and Dansville Broadcasting.
- (d) I handled all aspects of the litigation.

(10) Carol L. Buell v Thomas R. Buell.
Dates of Representation: November 17, 1981 - January 1, 1987

Court: State of New York, County of Livingston, Supreme Court

Judge: Hon. Robert J. Houston (deceased)

Counsel:

Theodore S. Kantor counsel for defendant
16 East Main Street Suite 950
Rochester, New York 14614
(585) 262-4700

(a) This case was not reported.

(b) This was an ancillary proceeding involving maintenance and other payments pursuant to a divorce decree.

(c) I represented the plaintiff, Carol L. Buell.

(d) I handled all aspects of the case.

20. Criminal History: State whether you have ever been convicted of a crime, within ten years of your nomination, other than a minor traffic violation, that is reflected in a record available to the public, and if so, provide the relevant dates of arrest, charge and disposition and describe the particulars of the offense.

Answer: No

21. Party to Civil or Administrative Proceedings: State whether you, or any business of which you are or were an officer, have ever been a party or otherwise involved as a party in any civil or administrative proceeding, within ten years of your nomination, that is reflected in a record available to the public. If so, please describe in detail the nature of your participation in the litigation and the final disposition of the case. Include all proceedings in which you were a party in interest. Do not list any proceedings in which you were a guardian *ad litem*, stakeholder, or material witness.

Answer: Yes.

Actions Against Court of Appeals

1. Matter of N.Y. State Assn. of Criminal Defense Lawyers v Kaye et al. (96 NY2d 512 (2001)) Article 78 proceeding in which the petitioners challenged the Court's authority to alter reimbursement rates for assigned counsel in capital appeals. The Court determined that the Court had the administrative authority to establish those rates and dismissed the petition.

2. Hudson v State of New York (No. 02-CIV-6600[RCC])

This action was commenced in the U.S. District Court for the Southern District of New York. Mr. Hudson was a party to a State court action to quiet title to property in Dutchess County. Among other things, he made a motion for leave to appeal to the Court of Appeals (Hudson v Edgett, No. 97/782). That motion was denied. Mr. Hudson then asked the Court to certify a document he had submitted to the Court of Appeals, but court personnel were unable to locate it in the file. Although Mr. Hudson's action is directed against the Court of Appeals, I was not personally served in the matter. The Attorney General's Office is handling the matter and I would be more than happy to supply any additional information concerning that matter or refer any inquiries in that regard to the appropriate Assistant Attorney General.

3. Liang-Houh Shieh v Pataki, et al. (OAG No. 98-000881-0)*

Dr. Shieh, apparently disgruntled over a bar admission matter, obtained criminal judgments against members of the Court of Appeals and others in Taiwan without ever serving any member of the Court. Again, the New York State Attorney General's Office is working on the matter with outside counsel to have these "criminal" judgments vacated in Taipei. However, that process is not as of yet entirely successful. Any documents that we have received are in Chinese. Again, I would be more than happy to provide further materials, if necessary, along with the name and address of the Assistant Attorney General handling the matter.

* There is also a related matter involving the Taipei Economic and Cultural Office in New York.

4. Multani v U.S. DOJ, et al (97 - CV - 628)

Bruce Feldman, head of the Attorney General's Litigation Bureau, reports that this case was dismissed, and the Attorney-General's file closed, in January 1999. This Federal court action followed proceedings in State courts bearing the same title. On June 5, 1996, the State action was dismissed by Supreme Court, Erie County (Whelan, J., Index No. I-1996-1923). Multani appealed to the Appellate Division, Fourth Department, which affirmed in an order entered November 8, 1996 (Denman, P.J., Green, Wesley, Doerr and Boehm, JJ., No. 1723). Multani appealed to the Court of Appeals, which dismissed the appeal *sua sponte* upon the ground that no substantial constitutional question is directly involved on January 9, 1997 (Titone and Wesley, JJ. taking no part, Mo. No. 1716, SSD 117). Apparently Multani then unsuccessfully sought review in the Supreme Court of the United States. The complaint in the Federal action attempts to allege a violation of Multani's right to due process as a result of "judicial malpractice." Multani's motion for default judgment in the Federal action was denied, and the action later was dismissed.

5. Sinacore v NY Ct. of Appeals (8:02-CV-0761-T-27MSS)

The Assistant Attorney General handling this case (Steve Schwartz, tel. 518-473-8047) reports that plaintiff's claims were dismissed with prejudice in late November, 2002. Mr. Sinacore sued the Court of Claims and other State courts, including the Court of Appeals for dismissing his lawsuit challenging certain disciplinary matters involving his employment as a corrections officer. Specifically, he sued the Court of Appeals for not granting leave to hear his appeal of the dismissal below. In an order dated November 19, 2002, the District Court dismissed with prejudice the claims against, *inter alia*, the Court of Appeals, upon the ground that "Judicial Defendants enjoy absolute immunity from Plaintiff's purported Claims."

Additional information concerning any actions brought against the Court of Appeals of the State of New York can be obtained from the Clerk of the Court, the Honorable Stuart M. Cohen, 20 Eagle Street, Albany, NY 12207 (518-455-7810).

22. Potential Conflict of Interest: Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts of interest during your initial service in the position to which you have been nominated.

Answer: My general procedure to resolve a potential conflict of interest has been, and remains, to examine carefully every case before me to determine if I have any familiarity

with the parties outside the confines of that case. If I would not feel comfortable ruling against a party because of that relationship, I will not sit on the case. To ensure no conflicts arise, I have compiled a list of all my investments, boards on which I sit, organizations of which I am a member and people with whom I have worked closely. I routinely cross-reference the parties in a case before me against this list to guarantee that neither a potential conflict of interest exists nor the appearance of such. I have always adhered to the New York Code of Judicial Conduct in that regard (see, Canon 3(C)) and will adhere to the requirements of the Code of Judicial Conduct (28 USC § 455)

23. Outside Commitments During Court Service: Do you have any plans, commitments, or arrangements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.
Answer: No
24. Sources of Income: List sources and amounts of all income received during the calendar year preceding the nomination, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding \$500. If you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here.
Answer: See Financial Disclosure Report, attached as **schedule 2**.
25. Statement of Net Worth: Complete and attach the financial net worth statement in detail. Add schedules as called for. See attached Net Worth Statement.
26. Selection Process: Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts?
Answer: Yes.
- (a) If so, did it recommend your nomination?
Answer: No. The Governor's Screening Committee reviews candidates for the District Court.
- (b) Describe your experience in the judicial selection process, including the circumstances leading to your nomination and the interviews in which you participated.
Answer: I was called to the White House on September 18, 2002 with regard to a vacancy at the Second Circuit. I was interviewed by White House Counsel Alberto Gonzales and staff, along with someone from the Department of Justice. During the interview, I discussed my work at the Court of Appeals and my personal and professional background.

In late December, I was contacted by the White House and told they would like me to complete some paperwork for a background check. I completed several forms, including an SF-86, a White House Questionnaire, the Senate Committee on the Judiciary Questionnaire and a financial disclosure form. I forwarded those forms to the Office of Legal Policy at the Department of Justice.

Thereafter, I was interviewed over the phone by a representative of the Office of Legal Policy -- the interview lasted several hours and covered most of my professional and personal life. I was also interviewed in person by an F.B.I. agent in my Albany chambers. That interview also covered my professional and personal life experiences. I also spoke with the Agent over the phone on two or three occasions to answer questions he had.

- (c) Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as asking or seeking a commitment as to how you would rule on such case, issue, or question? If so, please explain fully.

Answer: No.